

PRO BONO & HUMAN RIGHTS ALERT

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IN THIS ISSUE

Of courts and their orders: What you need to know as confirmed by the Constitutional Court

Suppose you've, for years, fought a long and arduous litigation battle. You're eventually vindicated and have a court order granted in your favour. Only for the party against whom the order is granted to effectively ignore the order for years, to plead impossibility to comply when you try to enforce the order, and to claim that compliance with the order would be a contravention of a certain law. If this conduct was to be sanctioned by a court of law – effectively your (binding) court order would be rendered nugatory and meaningless. Surely, this cannot be said to be in the interest of justice, can it?



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Of courts and their orders: What you need to know as confirmed by the Constitutional Court

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On 14 February 2022, the Constitutional Court in *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3 reaffirmed that a court order is binding until it is set aside by a competent court, and that this necessitates compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. Importantly, however, the court further confirmed that where an organ of state genuinely believes that an order of court is a nullity, then it has a duty in the public interest to pursue an appeal to correct the illegality.

THE FACTS

Ms Ndabeni's (the respondent) claim arose out of her alleged unlawful termination of employment. A resolution adopted by the OR Tambo District Municipality's (the second applicant) municipal council converted all contract employees to permanent employees. Ms Ndabeni, who was a contract employee at the time, seemingly fell within the ambit of the resolution, but was, for

reasons that were never explained, excluded from the implementation of the resolution. Aggrieved by the decision not to appoint her as a permanent employee, she launched an application in the Mthatha High Court against the municipal manager (the first applicant) and the municipality. During the pleading stage, the first and second applicants (the municipal parties) failed to file answering papers, but attempted to obstruct the court process by declaring the proceedings irregular and applying for adjournment on the day of the hearing. These attempts were unsuccessful, and the matter was disposed of on an unopposed basis. Mjali J ordered that Ms Ndabeni be declared the second applicant's permanent employee in accordance with the resolution (Mjali J order).

In what has been described as "*dilatoriness, inertia, and unaccountability*", the municipal parties adopted a cantankerous attitude to the court process by belatedly attempting to petition the Supreme Court of Appeal (SCA) to




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appeal against the Mjali J order, which was refused, and subsequently failing to appeal to the Constitutional Court or comply with the Mjali J order for two years, necessitating the initiation of contempt proceedings by Ms Ndabeni in the High Court. Inevitably opposing the proceedings, the municipal parties contended that their non-compliance with the Mjali J order was not wilful or *mala fide* but rather necessary as giving effect to the order would contravene section 66 of the Municipal Systems Act 32 of 2000 (Municipal Systems Act) – which prohibits employment in posts not on the staff establishment. This, if transgressed, would result in personal liability for the municipal manager (the first applicant). As a result, they contended that the Mjali J order was a nullity.

Ultimately, the High Court dismissed the contempt application, holding the Mjali J order to be a nullity. However, on appeal to the SCA, the majority of the SCA bench held that the municipal parties were indeed in contempt of

court in failing to comply with the Mjali J order and imposed a punitive costs order against them to mark their displeasure at the manner in which the municipal parties had conducted the litigation. The municipal parties appealed the majority's decision to the Constitutional Court on the grounds that the Mjali J order was a nullity.

CONSTITUTIONAL COURT JUDGMENT

The key question before the Constitutional Court was whether the municipal parties should be compelled to comply with the Mjali J order, which depended on whether the order was a nullity and enforceable or not.

In a unanimous judgment, written by Pillay AJ, the Constitutional Court drew on the judgments in *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA and Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in

the Public Sector including Organs of *State v Zuma* [2021] ZACC 18, reiterating two important principles:

- that court orders granted by a competent court are binding until set aside by a competent court in terms of section 165(5) of the Constitution, irrespective of whether they are valid; and
- that wrongly issued judicial orders are not nullities.

The court stated that for an order to be binding, all that is required is that the court in which the order was made must have had jurisdiction. Once this had been established, the decision must either be challenged by way of review (in the instance of some decisions of the Magistrate's Court) or by complying with appeal proceedings. Whether the decision was right or wrong on the merits does not affect the binding force of the order which stands until it is set aside on appeal or review by a competent court with jurisdiction.



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The court further reiterated and affirmed its interpretation in *Tasima* as to the distinction between the roles of the litigants and the court, holding that:

"It is the court that, once invalidity, is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations."

In dealing with the municipal parties' contention as to the validity of the Mjali J order on the basis that it contravened section 66 of the Municipal Systems Act, the court noted that the validity of the resolution had not been impugned in the proceedings before Mjali J. It was not self-evident from a reading of the resolution that it is inconsistent with section 66 of the Municipal Systems Act. In the absence of any evidence in the proceedings before Mjali J, the Constitutional Court held that the resolution appeared both in form and substance to provide the necessary framework required by section 66 of the Municipal Systems Act for the purposes of developing a staff establishment.

The municipal parties bore the onus to prove that Ms Ndabeni's position did not form part of the staff establishment provided for by the resolution. However, they failed to discharge this onus as they neglected to place any facts before Mjali J, as no answering papers were delivered and no explanation was provided as to why Ms Ndabeni, solely, was terminated while the rest of her colleagues were made permanent staff members.

In the absence of contrary evidence, the court concluded that the order in question was lawful. Given that it had not been appealed, the order remained a lawful order having been issued by a properly constituted court with jurisdiction, necessitating compliance.

In respect of whether the municipal parties were in contempt of court by not complying with the Mjali J order, the court noted that contempt requires proof of wilful or *mala fide* conduct. The High Court had found that the municipal parties' non-compliance with the order was neither wilful nor *mala fide*, and

accordingly contempt could not be proved. Additionally, a minority of two judges in the SCA agreed with the finding that the municipal parties were acting on legal advice. To this end, the Constitutional Court found that the SCA's decision to declare the municipal parties to be in contempt of the order was procedurally flawed as the SCA could not refute the High Court's finding. The appeal was upheld only in respect of the contempt aspect, as it was beyond the court's power to make such decision.

Regardless, the court emphasised that consequences will follow where parties fail to comply with court orders and where they display "*dilatoriness, inertia and unaccountability*".

RESPONSIBILITY ON ORGANS OF STATE

Importantly, the Constitutional Court highlighted that organs of state have heightened duties to respect the rule of law and, more specifically, are expressly enjoined to "*assist and protect the courts to ensure the independence, impartiality, dignity,*

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accessibility and effectiveness of the courts". They have a further duty in the public interest to pursue an appeal where they genuinely believe a decision is wrongful or illegal. As was held in Tasima, state organs are entitled to challenge the lawfulness of exercises of public power in appropriate circumstances, and "the court would exercise its discretion to overlook an unreasonable delay, and nevertheless consider a reactive challenge to the validity of an administrative decision or court order."

Notwithstanding this, public officials must not abuse the court process. This was clearly highlighted by the Constitutional Court in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6, where it was stated that:

"there is a higher duty on the state to respect the law, to fulfil the procedural requirements and to trade respectfully when dealing with rights. Government is not an indigent

or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline."

In this matter the court held that the municipal parties reneged on these duties. They abandoned their belated attempts to appeal the order, and neglected to place any factually substantive defence before Mjali J, from which it can only be concluded that they acted "self-interestedly". They showed blatant disregard for judicial authority by ignoring the well-established principle that in terms of section 165(5) of the Constitution, court orders are binding until set aside. Moreover, they abused their position in pursuing litigation at the public's expense and unduly burdened Ms Ndabeni who was, as a result, rendered unemployed for an unreasonable length of time.

Accordingly, a punitive costs order was imposed. The court also granted leave to approach the High Court to enforce compliance with its order if necessary.

The judgment underscores the Constitutional Court's determination to affirm the authority of the judiciary and the necessity to respect the court process. It reiterates that compliance with court orders is crucial in South Africa's constitutional dispensation founded on the rule of law, as judicial authority is vested in the courts. Once court orders are disobeyed without consequence, enforcement is compromised, and the courts and judicial authority are rendered incompetent. Courts must be respected as final arbiters of all legal disputes.

More practically, the judgment is an important reminder of the heightened obligation on organs of state to respect the law and the judicial process and to litigate ethically. Even where they are not *mala fide* and face no contempt order, they may face consequences for not doing so through punitive costs orders.

GIFT XABA AND GABY WESSON



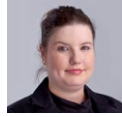
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